A

## Ketua Pengarah Insolvensi v Goh Ah Kai & Anor

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-01(IM)-296–08 OF 2014
ZAWAWI SALLEH, IDRUS HARUN AND VERNON ONG JJCA
23 JANUARY 2015

C

*Bankruptcy — Adjudication order — Annulment — Application for — Court's discretion in annulling bankruptcy — Discretion of court, how exercised — Judgment debt paid in full directly to creditor instead of official assignee — Whether failure to settle debt in accordance with correct procedure — Whether proven to the satisfaction of the court that debts paid in full – Whether court should not exercise its discretion to annul the adjudication — Bankruptcy Act 1967*

D

*Bankruptcy — Adjudication order — Annulment — Costs — Whether Director General of Insolvency ('DGI') entitled to realise distribution fees before making of annulment order — Whether DGI can be made liable to pay costs of application — Whether DGI must be made a party in the proceedings*

E

F

The second respondent had vide a sessions court suit obtained judgment in default against the first respondent for the cost of some medical treatment. The first respondent was subsequently adjudged a bankrupt on 9 January 2013. The second respondent was the only party to have filed a proof of debt against the first respondent's estate in bankruptcy. On 6 November 2013, one Goh Chin Wei paid the second respondent the full judgment debt. The second respondent then wrote a letter to the Director General of Insolvency ('DGI') informing the DGI that the first respondent had paid the judgment debt in full and that they thereby withdrew their proof of debt. The first respondent then applied to have the bankruptcy order annulled. The SAR dismissed the application and ordered that the second respondent to refund to the DGI the monies paid in satisfaction of the judgment debt. On appeal to the judge in chambers, the learned judicial commissioner ('JC') set aside the decision of the SAR and annulled the bankruptcy order made against the first respondent. The DGI was also ordered to pay costs of RM5,000 to the first respondent. The DGI appealed against the decision of the learned JC. The DGI's grounds for opposing the first respondent's application were: (a) that the first respondent did not settle the debt in accordance with the correct procedure and a third party is not permitted to make payment to the second respondent on the first respondent's behalf; and (b) before any annulment order can be made the DGI

G

H

I

is entitled to realise distribution fees in accordance with the Bankruptcy (Fees) Rules 1969.

**Held**, allowing the appeal and reinstating the order of SAR and dismissing the first respondent's application:

(1) It is not proper for a third party to settle the debts of the estate of a bankrupt without the knowledge of or reference to the OA (see para 26).

(2) One of the objects of the Bankruptcy Act 1967 ('Act') is to protect creditors. However, in exercising its discretion whether or not to annul an adjudication, the court is bound to consider not only the interest of creditors. The court must also consider whether an annulment is conducive or detrimental to commercial morality and to the interests of the public at large. As such, any private arrangements between a debtor (and a third party) and his creditor is to be deprecated. Once a person is adjudged a bankrupt, the conduct of his affairs is vested in the hands of the official assignee ('OA'). All matters relating to the bankrupt's estate should be dealt through the OA. Whatever private arrangements or transactions entered into between the bankrupt or any third party and his creditors without reference to or knowledge of the OA is not binding on the estate of the bankrupt (see para 27).

(3) The first respondent's application for an annulment was predicated upon the ground that the debts had been paid in full by a third party. Even if the second respondent's letter amounted to an unconditional release to the first respondent, it did not automatically follow that the court will make an order of annulment (see para 29).

(4) The court is not bound to exercise its discretion in annulling an adjudication simply because the creditors consent. The assent of the creditors can only be exercised subject to the approbation of the court, and subject to the condition that the conduct of the first respondent does not fall within certain categories of the Act (see para 29).

(5) On the basis of the affidavit evidence, it was not proven to the satisfaction of the court that the debts of the first respondent had been paid in full. The purported payment was not made through the OA. The OA had no knowledge of the payment transaction and as such the OA was unable to verify whether the debt had in fact been paid in full in cash. As such, the court should not exercise its discretion to annul the adjudication (see para 30).

(6) The learned JC made an order for costs to be borne by the DGI. There was no action brought against the DGI; neither was there any application to make the DGI a party to the proceedings. As such, r 69(3) of the Bankruptcy Rules 1969 whereby the DGI shall not be personally liable for costs was not applicable (see para 31).

(7) In any application for an annulment of an adjudication, it is of necessity that the DGI be made a party in the proceedings. For in an application for an annulment, it is for the OA as receiver and manager qua trustee of the estate of the bankrupt to satisfy the court that the conditions for annulment are satisfied and that in the circumstances of the case, the court must annul the bankruptcy. Accordingly, it is not appropriate to order that the DGI be personally liable in costs (see para 32).

**[Bahasa Malaysia summary**

Responden kedua melalui guaman mahkamah seksyen memperoleh penghakiman ingkar terhadap responden pertama untuk kos beberapa rawatan perubatan. Responden pertama kemudian telah dihukum bankrap pada 9 Januari 2013. Responden kedua hanya satu-satunya pihak yang telah memfailkan bukti hutang terhadap estet responden pertama dalam kebankrapan. Pada 6 November 2013, Goh Chin Wei telah membayar kepada responden kedua penghakiman hutang sepenuhnya. Responden kedua kemudian telah menulis surat kepada Ketua Pengarah Insolvensi ('KPI') memaklumakan KPI bahawa responden pertama telah membayar penghakiman hutang sepenuhnya dan bahawa mereka dengan itu menarik balik bukti hutang mereka. Responden pertama kemudian memohon agar perintah kebankrapan itu dibatalkan. Penolong kanan pendaftar telah menolak permohonan itu dan memerintahkan bahawa responden kedua membayar balik kepada KPI wang yang telah dibayar bagi memenuhi penghakiman hutang itu. Atas rayuan kepada hakim dalam kamar, pesuruhjaya kehakiman ('PK') telah mengetepikan keputusan KPI dan membatalkan perintah kebankrapan terhadap responden pertama. KPI juga diperintahkan untuk membayar kos RM5,000 kepada responden pertama KPI telah merayu terhadap keputusan PK yang bijaksana alasan KPI untuk membantah permohonan responden pertama adalah: (a) bahawa responden pertama tidak menyelesaikan hutang menurut prosedur yang betul dan pihak ketiga tidak dibenarkan untuk membuat bayaran kepada responden kedua bagi pihak responden pertama; dan (b) sebelum apa-apa perintah pembatalan boleh dibuat KPI berhak untuk merealisasikan fi pengagihan menurut Kaedah-Kaedah Kebankrapan (Fi) 1969.

**Diputuskan**, membenarkan rayuan dan mengembalikan semula perintah PKP dan menolak permohonan responden pertama:

(1) Ia adalah tidak wajar untuk pihak ketiga menyelesaikan hutang estet seorang bankrap tanpa pengetahuan atau rujukan pemegang serah hak rasmi (lihat perenggan 26).

(2) Salah satu objektif Akta Kebankrapan 1967 ('Akta') adalah melindungi pemiutang. Walau bagaimanapun, dalam melaksanakan budi bicaranya sama ada atau tidak membatalkan suatu penghakiman, mahkamah terikat untuk mengambil kira bukan sahaja kepentingan pemiutang.

Mahkamah juga perlu mempertimbangkan sama ada pembatalan itu adalah kondusif atau memudaratkan moral komersial dan kepentingan orang ramai. Oleh itu, apa-apa urusan peribadi antara penghutang (dan pihak ketiga) dan pemiutangnya hendaklah dikecam. Apabila seseorang itu dihukum bankrap, pengendalian urusannya terletak pada pemegang serah hak rasmi ('PSHR'). Kesemua perkara berkaitan estet si bankrap hendaklah dikendalikan melalui PSHR. Apa pun urusan atau transaksi persendirian yang dimasuki antara si bankrap atau apa-apa pihak ketiga dan pemiutangnya tanpa rujukan kepada atau pengetahuan PSHR adalah tidak mengikat atas estet si bankrap (lihat perenggan 27).

(3) Permohonan responden pertama untuk suatu pembatalan sudah dijangkakan atas alasan bahawa hutang telah dibayar sepenuhnya oleh pihak ketiga. Walaupun surat responden kedua merupakan pembebasan tanpa syarat kepada responden pertama, ia tidak secara automatik mengikuti bahawa mahkamah akan membuat suatu perintah pembatalan (lihat perenggan 29).

(4) Mahkamah tidak terikat untuk melaksanakan budi bicaranya dalam membatalkan penghakiman hanya kerana persetujuan pemiutang. Persetujuan pemiutang hanya boleh dilaksanakan tertakluk kepada penerimaan mahkamah, dan tertakluk kepada syarat bahawa perilaku responden pertama tidak terangkum dalam kategori tertentu Akta (lihat perenggan 29).

(5) Berdasarkan keterangan afidavit, tidak dibuktikan kepada kepuasan mahkamah bahawa hutang responden pertama telahpun dibayar penuh. Bayaran yang dimaksudkan tidak dibuat melalui PSHR. PSHR tiada pengetahuan tentang bayaran transaksi itu dan oleh itu PSHR tidak dapat mengesahkan sama ada hutang itu pada hakikatnya telahpun dibayar penuh secara tunai. Oleh itu, mahkamah tidak patut melaksanakan budi bicaranya untuk membatalkan penghakiman itu (lihat perenggan 30).

(6) PK yang bijaksana membuat perintah untuk kos yang ditanggung oleh KPI. Tiada tindakan yang dimulakan terhadap KPI; juga tiada apa-apa permohonan untuk membuat KPI satu pihak kepada prosiding itu. Oleh itu, k 69(3) Kaedah-Kaedah Kebankrapan 1969 di mana KPI tidak bertanggungjawab secara peribadi untuk kos tidak boleh terpakai (lihat perenggan 31).

(7) Dalam apa-apa permohonan untuk pembatalan suatu penghakiman, ia adalah perlu untuk KPI dijadikan pihak dalam prosiding itu. Ini adalah kerana dalam suatu permohonan untuk pembatalan, ia adalah untuk PSHR sebagai penerima dan pengurus pemegang amanah estet si bankrap untuk memuaskan mahkamah bahawa syarat untuk pembatalan telah dipenuhi dan bahawa dalam keadaan kes ini, mahkamah perlu

membatalkan kebankrapan itu. Sehubungan itu, ia tidak sesuai untuk memerintahkan agar KPI bertanggungan sendiri untuk kos (lihat perenggan 32).]]

**Notes**

For cases on annulment, see 1(3) *Mallal's Digest* (5th Ed, 2015) paras 3160–3174.

**Cases referred to**

*Behn Meyer International Trading Sdn Bhd v Premier Design Sdn Bhd* [2012] 1 CLJ 601, HC (refd)
*James Daim Ak Ramong v Interfinance Bhd* [1999] MLJU 36, HC (refd)
*Kwong Yik Bank Bhd v Hah Chiew Yin* [1985] 2 MLJ 452, FC (refd)
*Haji Yahya Lampong, Ex parte Sabah Development Bank Bhd, Re* [1987] 2 MLJ 488 (refd)
*Keet, Re* [1905] 2 KB 666, CA (refd)
*Peter Wong: Ex Parte The Debtor, Re* [1959] 1 MLJ 27, CA (refd)
*Sama Credit & Leasing Sdn Bhd v Pegawai Pemegang Harta, Malaysia* [1995] 1 MLJ 274, SC (refd)
*Ting Nguk Yong v Bank Utama (Mlaysia) Bhd* [1999] 1 CLJ 173, HC (refd)

**Legislation referred to**

Bankruptcy Act 1883 s 35
Bankruptcy Act 1914 s 29(1)
Bankruptcy Act 1967 ss 8(1), 33, 38(1)(a), 71(1), 105(1)
Bankruptcy Rules 1969 r 69(3)
Rules of Court 2012 O 1 r 2(2), O 94 r 2(1)

**Appeal from:** Bankruptcy No 29–1426–04 of 2012 (High Court, Johor Bahru).

*Rosli bin Ahmad (Ariff Hakimi with him) (Federal Counsel, Department of Insolvency) for the appellant.*
*Clarence Edwin (R Paramanandan with him) (Clarence Edwin Law Offices) for the respondent.*

**Vernon Ong JCA:**

INTRODUCTION

**[1]** The first respondent was adjudged a bankrupt on 9 January 2013. The first respondent's application to annul the bankruptcy order against him was dismissed with costs by the senior assistant registar ('SAR'). On appeal to the judge in chambers, the learned judicial commissioner ('JC') set aside the decision of the SAR and annulled the bankruptcy order made against the first

respondent. This is the Director General of Insolvency's ('DGI') appeal against the decision of the learned JC.

BRIEF ACCOUNT OF THE SALIENT FACTS

**[2]** The second respondent, Parkway Hospitals Singapore Pte Ltd, was the plaintiff in a suit filed in the Johore Bahru Sessions Court. There were two defendants, the first was one Madam Tan Lai Huwee and the second was the first respondent Goh Ah Kai. Madam Tan Lai Huwee was the first respondent's mother who passed away on 22 June 2009.

**[3]** In the JB suit, Parkway Hospital's claim was for the cost of medical treatment received by the late Madam Tan at one of Parkway Hospitals in Singapore. The first respondent had stood as a surety under a guarantee for the cost of the treatment.

**[4]** Judgment in default was obtained against both defendants in the JB suit. Subsequently, bankruptcy proceedings was taken by Parkway Hospitals against the first respondent. The first respondent was adjudged a bankrupt on 9 January 2013.

**[5]** Parkway Hospitals was the only party to have filed a proof of debt against the first respondent's estate in bankruptcy.

**[6]** On or about 6 November 2013, one Goh Chin Wei a grandson of the late Madam Tan, paid Parkway Hospitals the full judgment debt. By a letter of even date addressed to the DGI, Parkway Hospitals indicated as follows:

> 2 We write to inform that Goh Chin Wei (NRIC No 870728-23-5355) has paid to us in full the total amount owing by the judgment debtor/bankrupt, Goh Ah Kai.
>
> 3 In the circumstances, we have no further claims against Goh Ah Kai and accordingly give you notice of the withdrawal of our proof of debt.

**[7]** The first respondent then filed an application to have the bankruptcy order annulled. The SAR dismissed the first respondent's application with costs and also ordered that Parkway Hospitals refund to the DGI the monies paid by Goh Chin Wei in satisfaction of the judgment debt.

**[8]** The DGI being dissatisfied with the decision of the SAR appealed to the learned JC who allowed the appeal and set aside the order of the SAR. Consequently, the receiving order and adjudication order against the first respondent was annulled. The DGI was also ordered to pay costs of RM5,000 to the first respondent.

DECISION OF THE LEARNED JC

**[9]** In his grounds of decision, the learned JC identified the DGI's two main grounds for opposing the first respondent's application:

(a) that the first respondent did not settle the debt in accordance with the correct procedure and a third party is not permitted to make payment to Parkway Hospitals on the first respondent's behalf; and

(b) before any annulment order can be made the DGI is entitled to realise distribution fees in accordance with the Bankruptcy (Fees) Rules 1969.

**[10]** Briefly stated, the findings of the learned JC on the issues may be summarised as follows:

(a) the duties of the DGI as spelt out in s 71(1) of the Bankruptcy Act 1967 ('BA 1967') is to regulate the conduct of the debtor and the administration of his estate (*Behn Meyer International Trading Sdn Bhd v Premier Design Sdn Bhd* [2012] 1 CLJ 601);

(b) s 38(1)(a) of the BA 1967 does not prohibit, proscribe or forbid a bankrupt or any third party from settling in full the debt of the bankrupt's estate directly with the petitioning creditor without the knowledge of or reference to the DGI;

(c) on the facts it had been proven to the satisfaction of the court that the debts of the first respondent had been paid in full; and

(d) the mode of satisfaction of the debt or the party who makes full settlement are irrelevant considerations to the issue of whether the first respondent had satisfied the court that the judgment debt lawfully due to Parkway Hospitals had been paid in full that would entitle the first respondent to apply for an annulment order under the second limb of s 105(1) of the BA 1967 .

BANKRUPTCY LAW —THE UNDERLYING PRINCIPLES

**[11]** The law relating to bankruptcy in Malaysia is governed by the BA 1967. The rules of procedures for carrying into effect the objects of the BA 1967 are set out in the Bankruptcy Rules 1969 ('BR 1969'). The BR 1969 is a comprehensive set of rules specifically governing bankruptcy proceedings. As such, it is settled that the provisions of the Rules of Court 2012 (' the ROC 2012') do not apply to bankruptcy proceedings (see O 1 r 2(2), O 94 r 2(1) and Appendix C of the ROC 2012; *Re Haji Yahya Lampong, Ex parte Sabah Development Bank Bhd* [1987] 2 MLJ 488).

**[12]** Briefly, bankruptcy laws are premised on the need to protect creditors.

As such, the BA 1967 is intended to impose an ordered settlement of the debtor's affairs. Accordingly, the conduct of his affairs are taken out of his hands and vested in the office of the official assignee; whose function is to realise the assets of the debtor and from the proceeds make such payments (in the form of dividends) to the creditors, insofar as that is possible (G K Ganesan, *Bankruptcy Law in Malaysia and Singapore*, at p 2).

**[13]** In other words, once a debtor is adjudged a bankrupt upon the making of a receiving order and an adjudication order ('ROAO'), the debtor and his property (described in law as his estate) comes under the control of the bankruptcy law and his estate is jointly administered by the court and the official assignee. The official assignee is empowered to trace and recover any property of the debtor in the hands of third parties.

**[14]** The estate of the debtor is distributed among the creditors who are able to satisfy the official assignee that the debtor owes them a legally recoverable debt.

ORDER OF DISCHARGE

**[15]** Once all the assets of the debtor have been realised and distributed among his creditors, the debtor may apply for an order of discharge. As a general rule, the courts are required to consider a report of the DGI on the debtor's conduct and affairs, including a report as to the debtor's conduct during the proceedings under his bankruptcy. The court may either grant or refuse an absolute order of discharge (s 33 of the BA 1967).

ANNULMENT OF BANKRUPTCY

**[16]** In law, the court has the power to annul the adjudication in three situations (s 105(1) of the BA 1967). They are:

(a) where in the opinion of the court the debtor ought not to have been adjudged a bankrupt;

(b) where the court is satisfied that the debts of the debtor are paid in full; and

(c) where proceedings are pending in Singapore under her bankruptcy laws and the distribution ought to take place in Singapore.

**[17]** There is a clear distinction between an order of discharge and an annulment. An order of discharge has the effect of releasing the debtor from all debts which were provable in bankruptcy; whereas an annulment has the legal effect of wiping out the bankruptcy altogether and restores the debtor in the same position as if there had been no adjudication order — that is to say as if he was never adjudged a bankrupt (*Kwong Yik Bank Bhd v Hah Chiew Yin*

[1985] 2 MLJ 452 (FC); *Re Keet* [1905] 2 KB 666 at p 676).

ISSUES FOR DETERMINATION

**[18]** In this appeal, the principal issues that fall to be determined are as follows:

(a) whether there is any impediment to a third party paying the first respondent's debt directly to Parkway Hospitals without referring to the DGI? and

(b) whether it has been proved to the satisfaction of the court that the debts of the first respondent has been paid in full by the third party's payment to Parkway Hospitals? And if so, whether the court should exercise its discretion to annul the adjudication under s 105 of the BA 1967?

DISCUSSION

**[19]** In *Kwong Yik Bank Bhd v Hah Chiew Yin*, the judgment creditor obtained judgment against the judgment debtor in the sum of RM30,000 together with interest and costs in 1976. Subsequently, a sum of RM15,000 was paid towards reduction of the judgment debt in 1979. However, by 1981 the balance still due and owing plus accumulated interest was RM30,000 or thereabout. The judgment creditor then instituted bankruptcy proceedings against the judgment creditor for the balance outstanding sum. As a consequence, both receiving and adjudication orders were made against the judgment debtor on 5 July 1982. Subsequently, a sum of RM16,000 was paid to the judgment creditor with a view to effect a settlement in order to enable the judgment debtor to apply to the court to have the adjudication order annulled. The judgment creditor wrote to the DGI stating that its claim against the judgment debtor had been settled by the judgment debtor's husband. The judgment debtor then applied to court for an annulment of the adjudication order on the grounds that the debts had been paid in full. The High Court allowed the judgment debtor's application for an annulment. On appeal to the Federal Court, the judgment creditor contended that the judgment debtor had not satisfied the second limb of s 105(1) of the BA 1967. The Federal Court allowed the appeal and set aside the order of the High Court in annulling the adjudication order. The Federal Court held that on the affidavit evidence the bankrupt had failed to satisfy that the proved debt had been paid in full in cash. At p 453, George Seah FJ speaking for the Federal Court said:

> It is common ground that our Bankruptcy Act 1967 is modelled along the English Bankruptcy Act 1914 and the phrase in the second limb of s 105(1) of our Act is in identical terms with the words in the second limb of s 29(1) of the 1914 Act. The meaning of these words 'where it is proved to the satisfaction of the Court that the debts of the bankrupt are paid in full' was considered by the English Court of Appeal in the case of In re Keet. Although the decision was based on s 35 of the

English Bankruptcy Act 1883 it is not disputed that the section corresponded to s 29(1) of the 1914 Act. In re Keet it was held that to satisfy the section the 'debts' — including at least all debts which have been actually and properly proved in bankruptcy — must have been fully paid in cash, and that the second limb is not satisfied by an unconditional release given to the bankrupt by his creditors. Keet's case was followed some fifty-seven years later by Cross J in *More v More* [1962] 1 All ER 125. We have no doubt as to the soundness of this interpretation. In construing the provisions of the Bankruptcy Act 1967 it has to be borne in mind the observations of Fry LJ in *Re Hester* [1889] 22 QBD 632 at p 641:

> I conceive that one of the objects of this statute was, if not to put an end to, yet at least to discourage private arrangements between a debtor and his creditors. Anyone who knows the history of the law of debtor and creditor of this country, knows that private arrangements between debtors and their creditors have often been scandalous, and that they have given opportunities for misrepresentation, for private bargains, and for undue preferences. I for one should pause long before I allowed the evils of private arrangements between a debtor and his creditors to creep into the administration of this Act ...

We would adopt every word which has fallen from the lips of the learned Lord Justice.

**[20]** In *Re Hester Ex parte Hester*, the Court of Appeal held that the jurisdiction to rescind a receiving order is a matter of discretion; and that the order will not be rescinded as a matter of course because all the creditors consent to the rescission. It is only one of the elements of the case. The court will consider all the circumstances of the case, the interests of the general body of creditors, and the interests of the public. According to Lord Esher MR the Court of Appeal must in each case have all the facts before it, and it will then upon a consideration of the facts say whether the discretion has or has not be rightly exercised by the court below. At p 639 Lord Esher MR, said:

> The cases are clear that the court is not bound by the consent of all the creditors. Although the consent of all the creditors has been obtained, the court will still consider whether what they have agreed to is for the benefit of the creditors as a whole. The court has gone further, and I think rightly so, and has said that under the present Bankruptcy Act *it will consider not only whether what is proposed is for the benefit of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large*; and they will take into consideration the position of the bankrupt with regard to his creditors, and see whether what is proposed will not place his future creditors, who must come into existence immediately, in a position of imminent danger. (Emphasis added.)

**[21]** In the same breath, Fry LJ observed at p 641:

> The appeal is based on the idle notion that the court is bound by the consents of the creditors obtained, not at a meeting of the creditors, not after a full and open discussion of the rights and interest of the parties and the general position of things, but obtained by the debtor going round to his various creditors, and procuring the

> receipts of their debts, or consents to the rescission of the receiving order, upon what representation and in what manner we do not know. It is an idle notion that the court is bound by the consent of the creditors. The court has far larger and more important duties to perform than merely to consider what the creditors have consented to the rescinding of the order ... We are not only bound to regard the interests of the creditors themselves, who are sometimes careless of their best interest, but we have a duty with regard to the commercial morality of the country.

**[22]** In *Re Keet* the bankrupt applied in the county court for an annulment of his bankruptcy on the ground that all his debts which had not been released had been paid in full. The bulk of the bankrupt's creditors who had proved their debts in the bankruptcy executed a deed releasing him absolutely without any consideration, from the debts owing to them and applied to withdraw their proofs, while the few remaining creditors were paid in full in cash. The registrar made the order for annulment. There was an appeal to the Divisional Court who affirmed the order of the registrar on two grounds: (a) an absolute release of a debt by the creditor amounted to payment in full; and (b) the debts referred to were debts which existed as debts until they were paid and not debts which were destroyed by another process. There was an appeal to the Court of Appeal. The Court of Appeal did not agree with the Divisional Court. It held that: (a) there had been no 'payment in full' within the meaning of s 35 of the Bankruptcy Act 1883; and (b) the word 'debts' extended to all events, to all debts which have been properly proved in bankruptcy.

**[23]** In *Sama Credit & Leasing Sdn Bhd v Pegawai Pemegang Harta, Malaysia* [1995] 1 MLJ 274 (SC) Sama Credit had obtained a ROAO against its debtor. However, unknown to Sama Credit, the debtor had already been adjudicated a bankrupt two years earlier ('the first bankruptcy'). The official assignee ('OA') applied to set aside the orders on the grounds that the orders should not have been granted as the debtor's first bankruptcy was still subsisting and that Sama Credit's debt could be proved in that bankruptcy. It was not disputed that a copy of the bankruptcy petition was served on the OA and that neither he nor his representative appeared in court at the hearing of the petition when the orders were made. The senior assistant registrar refused to set aside the orders and the OA appealed to the High Court. The judge held that since a receiving order had been made and was in force, no further action could be commenced against the debtor without the leave of court by virtue of s 8(1) of the BA 1967 and set aside the orders on the ground, inter alia, that no search had been made by Sama Credit prior to the presentation of the petition. Dissatisfied with the decision of the High Court, Sama Credit appealed to the Supreme Court which allowed the appeal. The Supreme Court held that the powers to rescind and to annul a receiving order and an adjudication order are discretionary and the principles governing the exercise of the discretion for both are generally the same. All relevant facts and circumstances must be considered and where the court of first instance has exercised its discretion, a strong case would be

required to induce the appellate court to interfere. In that case, the failure to conduct a bankruptcy search, per se, is not fatal to the petition but is a factor to be considered. The OA could have taken steps to dismiss the petition but did not. As Sama Credit had acted in good faith without knowledge of the prior existing orders, the OA should not be allowed to complain. That the OA was amenable to the law of estoppel was beyond question.

**[24]** In *Ting Nguk Yong v Bank Utama (M) Bhd* [1999] 1 CLJ 173 the judgment creditor obtained judgment against the judgment debtor for RM1,500,00. Consequently, bankruptcy proceedings were instituted and receiving and adjudication orders were made against the judgment debtor. Later pursuant to negotiations entered into between a third party with the judgment creditor, a sum of RM500,000 was paid by the third party to the judgment creditor in full settlement of the debt. The judgment debtor then applied for an order of annulment of the adjudication order under s 105(1) of the BA 1967. The official assignee ('OA') opposed the application on the grounds, inter alia that the judgment debtor had not settled the debt in full and that no payment had been made to the OA. The High Court dismissed the judgment debtor's application on the grounds that (a) the jurisdiction to annul is discretionary, (b) the court can exercise its discretion only when the debts are paid in full, and (c) the OA is the trustee of the estate of the bankrupt and all dealings with the estate should be made through the OA.

**[25]** In *James Daim Ak Ramong v Interfinance Bhd* [1999] MLJU 36 (HC) (UR), the judgment debtor was adjudged a bankrupt on 12 July 1991. Later the judgment debtor applied for annulment of the adjudication on the grounds that the debt owing to the judgment creditor had been settled in full by a third party. The third party was a co-defendant in the same suit. The judgment creditor had written to the OA stating that the debt of the judgment debtor no longer existed. In that case, the judgment debtor and the third party were co-guarantors of a debt which the principal debtor owed to the judgment creditor; the debt that the judgment debtor owed the judgment creditor is the same debt that forms the basis of the bankruptcy proceedings against the judgment debtor. At the time of the adjudication the judgment debtor's debt with the judgment creditor existed and therefore the receiving order made against the judgment debtor was correct and proper. The High Court dismissed the judgment debtor's application. The consent of the petitioning creditor that the judgment debtor's debt had ceased to exist is a factor for the court to consider. However, there was no evidence before the court of the circumstances of the case, or of the interest of the general body of creditors, if any, which will move the court to exercise its discretion and make an order to annul the receiving order.

OUR DECISION

**[26]** In regard to the first issue, we hold that the view adopted by Muhammad Kamil Awang J in Ting Nguk Yong is correct and consistent with the principles enunciated in *Kwong Yik Bank Bhd v Hah Chiew Tin*, In *Re Keet* and *In re Hester*. We do not think that it is proper for a third party to settle the debts of the estate of a bankrupt without the knowledge of or reference to the OA.

**[27]** It is quite clear that one of the objects of the BA 1967 is to protect creditors. However, in exercising its discretion whether or not to annul an adjudication, the court is bound to consider not only the interest of creditors. The court must also consider whether an annulment is conducive or detrimental to commercial morality and to the interests of the public at large. As such, any private arrangements between a debtor (and a third party) and his creditor is to be deprecated. Once a person is adjudged a bankrupt, the conduct of his affairs are vested in the hands of the OA. All matters relating to the bankrupt's estate should be dealt through the OA. Whatever private arrangements or transactions entered into between the bankrupt or any third party and his creditors without reference to or knowledge of the OA is not binding on the estate of the bankrupt.

**[28]** As to the second issue, the proper approach in dealing with an application for an annulment of an adjudication was stated by Ambrose J (at p 30) in *Re Peter Wong: Ex Parte The Debtor* [1959] 1 MLJ 27 a Singapore Court of Appeal case in the following words:

> The proper approach in dealing with an application for annulment of an adjudication is that adopted by the Court of Appeal in *Re Dunn* [1949] CH 640; [1949] 2 All ER 388. In that case Evershed MR, said (at p 390) that the power given to the court by s 29(1) of the Bankruptcy Act 1914, is discretionary. That section corresponds to s 104(1) of the Bankruptcy Ordinance and provides as follows:
>
> > Where in the opinion of the court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, the Court may, on the application of any person interested, by order annul the adjudication' (s 29(1) of the Bankruptcy Act 1914 and s 104(1) of the Bankruptcy Ordinance are in para material with our s 105(1) of the Bankruptcy Act 1967).
>
> He considered that the word 'may' gives the court a discretion. In his view, before the court will exercise its discretion in favour of the applicant, the applicant must satisfy the court that the circumstances of the case are such that the court must annul the bankruptcy. This is clearly indicated by the following words of the learned Master of the Rolls:
>
> > I think the official receiver (the applicant) must go as far as to say that the court,

in the circumstances of this case, must annul the bankruptcy.

**[29]** In the present case, the first respondent's application for an annulment is predicated upon the ground that the debts have been paid in full by a third party as indicated in Parkway Hospitals' letter of 6 November 2013. Even if Parkway Hospital's letter amounts to an unconditional release to the first respondent, it does not automatically follow that the court will make an order of annulment. The authorities on this issue are quite settled. The court is not bound to exercise its discretion in annulling an adjudication simply because the creditors consent. It has never been held that the consent of the creditors alone will justify the court in annulling an adjudication. At any rate, the assent of the creditors can only be exercised subject to the approbation of the court, and subject to the condition that the conduct of the first respondent does not fall within certain categories of the BA 1967.

**[30]** On the basis of the affidavit evidence as aforesaid, we do not think that it has been proven to the satisfaction of the court that the debts of the first respondent has been paid in full. The purported payment was not made through the OA. The OA has no knowledge of the payment transaction and as such the OA is unable to verify whether the debt has in fact been paid in full in cash. Accordingly, the question is answered in the negative. As such, the question of whether the court should exercise its discretion to annul the adjudication is also answered in the negative.

WHETHER THE DGI IS LIABLE IN COSTS?

**[31]** At the High Court, the learned JC made an order for costs to be borne by the DGI. In the present case, there was no action brought against the DGI; neither was there any application to make the DGI a party to the proceedings. As such, we agree with the submission of learned counsel for the first respondent that r 69(3) of the Bankruptcy Rules 1969 whereby the DGI shall not be personally liable for costs is not applicable.

**[32]** Be that as it may, in any application for an annulment of an adjudication, it is of necessity that the DGI be made a party in the proceedings. For in an application for an annulment, it is for the official assignee as receiver and manager qua trustee of the estate of the bankrupt to satisfy the court that the conditions for annulment are satisfied and that in the circumstances of the case, the court must annul the bankruptcy. Accordingly, we do not think that it is appropriate to order that the DGI be personally liable in costs.

CONCLUSION

**[33]** For the foregoing reasons, it is hereby ordered that:

(a) the appeal is allowed;

(b) the order of the High Court is set aside;

(c) the order of SAR dismissing first respondent's application is reinstated;

(d) the SAR's order directing Parkway Hospitals to refund to DGI the sum that the third party paid to Parkway Hospitals is set aside;

(e) the first respondent's application is dismissed; and

(f) costs of RM10,000 to DGI here and below.

*Appeal allowed and order of SAR reinstated and the first respondent's application dismissed.*

Reported by Kanesh Sundrum